SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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NACHUM BOREK,

Plaintiff,

- v -

DR. STUART SEIDMAN, DR. ELIZABETH SUBLETTE, NEW YORK PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, and PAYNE WHITNEY PSYCHIATRIC CLINIC,

Defendants.

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INDEX NO. 805351/2021

MOTION DATE 01/25/2023

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 265, 278, 279, 280, 281, 282, 283, 284, 285, 294, 295, 296, 297, and the plaintiff's statement made on the record on January 25, 2023.

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendant Dr. Elizabeth Sublette moves pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against her as time-barred. By order and notice dated January 6, 2023, the court converted the motion to a motion for summary judgment dismissing the complaint on that ground (*see* CPLR 3211[c]; *Wesolowski v St. Francis Hosp.*, 108 AD3d 525, 526 [2d Dept 2013]; *cf. Meredith v Siben & Siben, LLP,* 130 AD3d 791, 791 [2d Dept 2015] [permitting the motion court to treat a post-answer CPLR 3211(a)(5) motion to dismiss complaint as time-barred as one for summary judgment, even in the absence of a formal conversion]). The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Sublette.

Sublette, a psychiatrist, examined and treated the plaintiff between February 23, 2014 and May 15, 2016. In a written summary of the treatment that she rendered to the plaintiff, Sublette diagnosed him with Bipolar I disorder, and explained that he

> "was seen frequently, often weekly, until May 2016. At every appointment he displayed significant ongoing psychotic symptoms. During those months we took

> him off the haloperidol and tried a number of other antipsychotic medications, including Saphris, Invega, Seroquel, and Zyprexa; and a brief trial of lithium which was subsequently switched back to Depakote. He never attained stability. I last saw him on 5/15/16 at which point I was recommending inpatient hospitalization at Zucker Hillside hospital."

The plaintiff was hospitalized from December 10, 2015 through January 8, 2016 at the defendant Payne Whitney Psychiatric Clinic, a division of the defendant New York Presbyterian Hospital/Weill Cornell Medical Center (together the NYPH defendants) in connection with an episode of mania. After his release on January 8, 2016, he was not hospitalized again until June 5, 2019, at which point he underwent three short hospitalizations between June 5, 2019 and August 8, 2019, totaling 11 days. Although Sublette asserted that the plaintiff "never attained stability" during the period when she was treating him, hospital records indicated that, upon his discharge from each of his four hospitalizations, his manic and psychotic symptoms had abated, and he reached some degree of stability in his affect, behavior, and mood after he was administered certain anti-psychotic and mood-altering medications.

The plaintiff commenced this action on November 4, 2021, asserting, in effect, that Sublette committed malpractice by misdiagnosing his condition and prescribing medications that either were ineffective or exacerbated his actual mental health conditions.

In support of her motion, Sublette submitted the pleadings, affidavits from family members that the plaintiff had served along with his complaint, the plaintiff's bill of particulars as to Sublette, correspondence, Sublette's own affidavit, prior decisions in this action and a related CPLR article 78 proceeding, and an attorney's affirmation. In her affidavit, Sublette asserted that the last date that she treated the plaintiff was May 15, 2016 and that, although he was under her care between February 23, 2014 and May 15, 2016, she did not see him between May 18, 2014 and December 6, 2014, and also did not see him during his first hospitalization between December 10, 2015 and January 8, 2016. She argued that the action was time-barred as to her, as more than two years and six months had elapsed between the date of her last

treatment and the plaintiff's commencement of the action, and because the plaintiff did not establish that he was entitled to a toll of the limitations period for insanity (*see* CPLR 208).

After the court converted the motion to a summary judgment motion, the plaintiff opposed the motion, submitting his own affidavit, a letter from his mother to Sublette contending that Sublette had misdiagnosed the plaintiff's mental health condition, an affidavit from nonphysician Eli Lerner, whose cousin is married to the plaintiff's cousin, an affidavit from nonphysician Sarah E. Mykoff, one of his own cousins, an affidavit from nonphysician Hannah Borek, his mother, a compendium of his mother's lay research into relevant diagnoses and medications, and a series of email messages from late 2017 through early 2018 amongst and between Hannah Borek, several physicians, a rabbi, and nonphysician acquaintances. The court, in its discretion, also considers the NYPH defendants' records of the plaintiff's 2016 and 2019 hospitalizations, and NYU Lagnone's records of the plaintiff's June 5, 2016 to June 6, 2016 hospitalization, as set forth in Docket Entries No. 130-139. Those records established, among other things, that the plaintiff was hospitalized on one occasion for 30 days prior to Sublette's last treatment, and a total of 11 days on three occasions over a three-year period subsequent to Sublette's last treatment.

In his opposition papers, the plaintiff argued that all of these documents, records, and correspondence established that he was insane for a sufficient period of time between May 15, 2016 and November 4, 2021 to permit him to avail himself of the tolling period for insanity and render this action timely commenced against Sublette, and that the doctrine of equitable tolling rendered his action timely commenced against Sublette.

In his affidavit, the plaintiff mostly recounted his various treatments and hospitalizations, whether he felt that they were effective in treating his condition, and the differences of opinion amongst many of his treating physicians as to the proper diagnoses and course of treatment. In his affidavit, Lerner asserted that he had been taking the plaintiff to the gym for almost two years, but that the plaintiff "mainly just sits in the pool, and only rarely lifts weights." He further

averred that the plaintiff assisted him with errands. Lerner opined that the plaintiff's "mental dysfunction is apparent. While he is friendly and makes light conversation, he has never spoken intelligently with me on any topics." Mykoff stated in her affidavit that the circumstances surrounding the plaintiff's mental health condition was "a whole mess," and that when she inquired of his mother how he was proceeding, his mother replied "he's going off very slowly" and was not "doing well." In her affidavit, the plaintiff's mother recounted that Dr. Robert D. McMullen, a psychiatrist, "acknowledged the possibility that Plaintiff may have been misdiagnosed." In his December 12, 2017 email to the plaintiff's mother, Dr. McMullen wrote

> "I will do everything I can to lower his medication. I have an open mind about that. I trust you will have just as open a mind about the possibility that he may have a mental illness.
>
> "I am impressed by your research however there are a few small problems:
>
> "#1: you have already made up your mind and you have been looking for information to buttress what you already believe. I sympathize with that—a mother wanting to do everything for her son.
>
> "#2: physical causes of relapsing mental illnesses are very rare whereas Bipolar I illness occurs in 1/100 people.
>
> "#3: there is no known connection between a wandering eye and a major mental illness."

In reply, Sublette submitted her attorney's affirmation, in which he reiterated that nothing submitted by the plaintiff established his insanity for any period at all, let alone for a period of time sufficient to invoke the toll and save his complaint from dismissal.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega*

v Restani Constr. Corp., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

In connection with a motion for summary judgment dismissing a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise a triable issue of fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP,* 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see MLB Sub I, LLC v Clark,* 201 AD3d 925, 927 [2d Dept 2022]; *Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Precision Window Sys., Inc. v*

EMB Contr. Corp., 149 AD3d 883, 884 [2d Dept 2017]; *Guzy v New York City*, 129 AD3d 614, 615 [1st Dept 2015]; *Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]).

The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is two years and six months, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). Likewise, the statute of limitations applicable to a cause of action sounding in lack of informed consent is two years and six months from the date of the alleged failure to provide the patient with information concerning the risks and benefits of a particular treatment or procedure (*see Wilson v Southampton Urgent Med-Care, P.C.*, 112 AD3d 499 [1st Dept 2013]). Sublette established, prima facie, that the plaintiff did not commence the action against her within two years and six months of the last date that she treated him. Consequently, unless the limitations period was tolled on account of the plaintiff's insanity, the limitations period applicable to his claims against her would have expired on November 15, 2018, and the commencement of the action on November 4, 2021 rendered the action untimely.

As the court explained in its July 25, 2022 order dismissing the complaint against the NYPH defendants (MOT SEQ 001), CPLR 208(a) provides, in relevant part, that

> "[i]f a person entitled to commence an action is under a disability because of . . . insanity at the time the cause of action accrues, and . . . the time otherwise limited [for commencing the action] is less than three years, the time [within which the action must be commenced] shall be extended by the period of disability."

The burden of establishing insanity in on the plaintiff (*see Scifo v Taibi*, 198 AD3d 704, 705 [2d Dept 2021]). The term "insanity" is not defined in CPLR 208 (*see id*.), and the toll of the statute applies "'to only those individuals who are unable to protect their legal rights because of an over-all inability to function in society'" (*Kelly v Solvay Union Free School Dist*., 116 AD2d 1006, 1006 [4th Dept 1986], quoting *McCarthy v Volkswagen of Am*., 55 NY2d 543, 548 [1982]).

CPLR 208 is subject to narrow interpretation (*see Matter of Goussetis v Young Adults with Special Abilities, Inc.,* 198 AD3d 761, 762 [2d Dept 2021]; *Scifo v Taibi*, 198 AD3d at 705; *Thompson v Metropolitan Transp. Auth.*, 112 AD3d 912, 914 [2d Dept 2013]; *Simon v Bryski,* 278 AD2d 224, 224 [2d Dept 2000]). In addition, as Sublette correctly noted, to invoke the toll for insanity, the plaintiff was required to establish that any disability due to insanity was continuous and that, if at any time, he experienced a "lucid interval" during which he regained the ability to protect his legal rights, the tolling would be vitiated (*Libertelli v Hoffman-LaRoche, Inc*., 565 F Supp 234, 237 [SD NY 1983] [applying New York law]; *see Bethune v Mount Sinai Beth Isr. Med. Ctr.,* 173 F Supp 3d 10, 11 [SD NY 2016] [same]).

"The task of determining whether the tolling provision applies 'is a pragmatic one, which necessarily involves consideration of all surrounding facts and circumstances relevant to the claimant's ability to safeguard his or her legal rights'" (*Matter of Goussetis v Young Adults with Special Abilities, Inc.,* 198 AD3d at 762, quoting *Matter of Cerami v City of Rochester School Dist*., 82 NY2d 809, 812 [1993]). A showing in this regard must be supported by medical evidence, such as a physician's affidavit or affirmation documenting the severity of the plaintiff's condition (*see Jemima O. v Schwartzapfel, P.C.,* 178 AD3d 474, 475 [1st Dept 2019]; *D'Onofrio v Mother of God With Eternal Life*, 60 Misc 3d 910, 916 [Sup Ct, Westchester County 2018]; *cf. Matter of Brigade v Olatoye*, 167 AD3d 462, 462 [1st Dept 2018] [medical records submitted by petitioner were sufficient to trigger a hearing of the issue of her sanity for purposes of applying toll to limitations period]; *Santana v Union Hosp. of Bronx*, 300 AD2d 56, 58 [1st Dept 2002] [affirmation of plaintiff's medical expert is sufficient to warrant a hearing on the issue of insanity]). As one court commented, "[n]o case has been cited, or located by this court, in which a finding of insanity to toll the statute of limitations under CPLR 208 has been made without such support" (*D'Onofrio v Mother of God With Eternal Life*, 60 Misc 3d at 916). In *D'Onofrio*, the court held that the plaintiff could not rely solely on her own assertions to prove insanity, despite the fact that she claimed that she was convinced of another person's supernatural

powers. Even where an expert affirmation is provided, "the Court is not required . . . to accept the conclusions of plaintiff's expert, retained after the commencement of litigation" (*Graboi v Kibel*, 432 F Supp 572, 579 [SD NY 1977]).

Here, the plaintiff did not provide any expert opinion testimony, in the form of a physician's affirmation or affidavit, concluding that he was unable to function in society at the time that the action accrued or for any period of time thereafter. The only evidence that he presented consisted of conclusory statements from his siblings, siblings-in-law, and cousins that merely tracked the language of various appellate decisions by reciting that he was "insane," "not fully sane," "mentally sick," "unable to function," and "not doing well," and that his "mental dysfunction" was "apparent" during an unspecified period of time during which the two-year-and-six month limitations period was running. These statements were based only on subjective observations of behavior by lay persons that, in and of themselves, did not establish insanity. Specifically, they established only that the plaintiff's relatives thought that he spoke and interacted physically with his nieces and nephews in an inappropriate manner, and that he occasionally spaced out, didn't make sense, could not concentrate, did not engage in intellectually stimulating conversation, and didn't appear mentally healthy, despite the fact that he was assisting one of his relatives with errands and accompanied him to the gym. All of these statements further relied on the subjective, non-expert, non-medical opinions of the plaintiff's mother as to his condition during certain periods of time.

Moreover, the NYPH and NYU Langone hospital records upon which the plaintiff relied showed only that, on 11 days over a three-year period subsequent to the accrual of his claims against Sublette, he suffered from manic or psychotic episodes that resolved after he was hospitalized and medicated. This, in and of itself, does not establish that the plaintiff was insane either during his hospitalizations or any time thereafter, when he was living at home. Even if the court were to conclude that the plaintiff was "insane" within the intendment of CPLR 208 for these 11 days, thus tolling the limitations period during those episodes, he still would have had

to commence the action against Sublette on November 26, 2018, which he did not do. In addition, even if the plaintiff suffered from the conditions or engaged in the behaviors described by his relatives, none of those conditions and behaviors, whether alone or together, established that he was legally "insane" at any time. As Sublette correctly argued, being depressed, apathetic, and dysfunctional are not sufficient grounds upon which the plaintiff may invoke the insanity toll (*see Sanders v Rosen*, 159 Misc 2d 563, 577 [Sup Ct, N.Y. County 1993]; *La Russo v St. George's Univ. Sch. of Med.*, 747 F3d 90, 99 [2d Cir 2014] [applying New York law]; *see also Khalil v Pratt Inst.*, 818 Fed Appx 115, 117 [2d Cir 2020]; *De Los Santos v Fingerson*, 1998 US Dist LEXIS 16657, 1998 WL 740851, *4 [SD NY, Oct. 23, 1998] ["apathy, depression, posttraumatic neurosis, psychological trauma and repression therefrom or mental illness alone" are insufficient to invoke the insanity toll]; *Wenzel v Nassau County Police Dept*, 1995 US Dist LEXIS 22067, 1995 WL 836056, *4 [ED NY, Aug. 5, 1995]). "Difficulty in functioning is not sufficient to establish insanity for purposes of § 208; rather, the plaintiff must be totally unable to function as a result of a 'severe and incapacitating' disability" (*Swartz v Berkshire Life Ins. Co.*, 2000 US Dist LEXIS 14039, 2000 WL 1448627, *5 [SD NY. Sept. 28, 2000] [citation omitted]). The statute applies only if the plaintiff had a disability "which prevents [him] from recognizing a legal wrong and from engaging an attorney to rectify it" (*Sanders v Rosen*, 159 Misc 2d at 577). There is no such proof included in the plaintiff's submissions.

The court notes that no Mental Hygiene Law article 81 guardian has been appointed for the plaintiff. In any event, even a judicial finding that a guardian had been appointed for a person because he or she was "intellectually disabled" within the meaning of SCPA 1750 or "incapacitated" within the meaning of Mental Hygiene Law article 81 would not be sufficient, in and of itself, to establish that the person was "insane" within the meaning of CPLR 208(a), or that the person otherwise was unable to pursue or safeguard his or her right in an action (*see Pieternelle v Smiley & Smiley, LLP [Matter of Verdugo],* 206 AD3d 577, 679 [1st Dept 2022]

[appointment of article 81 guardian is "not conclusive as to insanity"]; *Matter of Goussetis v Young Adults with Special Abilities, Inc.,* 198 AD3d at 762).

Finally, the plaintiff "has not shown that [he] was 'actively misled' by defendant, or that he 'in some extraordinary way had been prevented from complying with the limitations period'" (*Shared Communications Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 325 [1st Dept 2007], quoting *O'Hara v Bayliner*, 89 NY2d 636, 646 [1997]). Accordingly, he has failed to raise a triable issue of fact as to whether equitable tolling is applicable to his claims.

In light of the foregoing, it is

ORDERED that the motion is granted, the defendant Dr. Elizabeth Sublette is awarded summary judgment dismissing the complaint insofar as asserted against her, and the complaint be, and hereby is, dismissed insofar as asserted against the defendant Dr. Elizabeth Sublette; and it is further,

ORDERED that, on the court's own motion, the action is severed as against the defendant Dr. Elizabeth Sublette; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against the defendant Dr. Elizabeth Sublette.

This constitutes the Decision and Order of the court.

2/14/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[X]	**GRANTED**	[ ]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**